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IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1974

No. 74-214

CASPAR WEINBERGER, SECRETARY OF HEALTH, EDUCATION AND WELFARE, et al.,

Appellants,

vs.

CONCETTA SALFI, et al.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Brief Amici Curiae of the San Francisco Neighborhood Legal Assistance Foundation, Inc., Western Center on Law and Poverty, Inc., National Organization For Women, Inc., Mexican-American Legal Defense and Education Fund, Inc., Food Advocates, and Charles R. Drew Health Rights Project of the Charles R. Drew Post-Graduate Medical School, Los Angeles, California.

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INTRODUCTION

This Brief Amici Curiae is filed without motion, as permitted by Rule 42, the prior consent of the parties having been obtained. See Exhibits A and B hereto.

Amici are all public interest law firms that frequently litigate matters on behalf of classes of individuals (largely poor individuals) whose rights can be adequately protected only by means of the provisions of Rule 23(b)(2), Fed. R. Civ. Proc. Because such litigative activity of amici would be gravely impaired by a holding that the Due Process clauses of the Fifth and Fourteenth Amendments required notice to the absent class members of such a class, amici submit the following Brief.

SUMMARY OF ARGUMENT

Due Process does not require that notice be given to the absent members of a class when the class action is certified pursuant to Rule 23(b)(2), Fed. R. Civ. Proc. Such a class is quite cohesive in character such that the members of the class are nearly fungible. Due Process is satisfied by the firm assurance that the named plaintiffs adequately represent the absent members of the class. Such assurance can be achieved, in nearly all cases without notice. However, when notice is deemed necessary under the circumstances, Rule 23(d) (2) provides for such discretionary notice to the extent deemed advisable by the District Court.

INDIVIDUALIZED NOTICE TO MEMBERS OF THE CLASS IS NOT REQUIRED IN THIS CASE

Amici agree with appellees' position that SSA waived any objection they may have had to a class action. However, amici deem it necessary to elaborate upon SSA's completely unilluminating assertion that notice is required pursuant to Rule 23, Fed. R. Civ. Proc., Eisen v. Carlisle & Jacqueline, 391 F.2d 555, 564-65 (2d Cir. 1969) (commonly called "Eisen II") and this Court's decision in Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

The best possible notice, including individualized notice is clearly required in a Rule 23(b)(3) class action. But the requirement of notice exists because of 1/ the clear command of Rule 23(c)(2), not be-

1/ Rule 23(c)(2) Federal Rules of Civil Procedure reads as follows:

"In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice to all members who can be identified through reasonable effort.

cause of the Due Process Clause. Eisen v. Carlisle & Jacquelin, supra, at 177. By its terms, the mandatory notice requirement of Rule 23 (c) (2) is inapplicable to a Rule 23(b)(2) [2/] class action, such as the present one. Id., 177, n. 14. In a Rule 23(b)(2) class action, notice may be given if, in the sound discretion of the Court, notice is deemed necessary "for the protection of the members of the class, or otherwise for the fair conduct of the action . . . ." Fed. R. Civ.

The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel."

2/ Rule 23(b)(2) provides that an action may be maintained as a class action if the requirements of subdivision (a) are satisfied, and in addition:

"the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. . . ."

P., Rule 23(d)(2). If a court exercises its discretion to require notice, it may provide that notice be given "to some or all of the members [at] any step of the action. . . ." Id. The court may advise, in its sound discretion, some or all of the members of the class "of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise come into the action. . . ." Id.

This express distinction in Rule 23 between mandatory and discretionary notice comes heavily freighted with a presumption that it does not transgress "constitutional restrictions." Hannah v. Plumer, 380 U.S. 460, 471 (1965); 2 Moore, FED. PRAC. (2d Ed., 1974) §1.04(4), p. 231; Professor Moore characterizes this as a "strong presumption." 3B Moore, FED. PRAC. §23.55, p. 23-1152 (2d Ed., 1974). Judge Frankel, in discuss-

ing this distinction, refers to the "weighty presumption of validity with which the Supreme Court's imprimatur invests the rule . . . ." Frankel, "Some Preliminary Observations Concerning Civil Rule 23," 43 F.R.D. 39, 45. The Advisory Committee on Federal Rules, after over a decade of deliberation, prior to proposing the Rules to this Court specifically noted that the mandatory-discretionary distinction "was designed to fulfill the requirements of due process. . . ." Advisory Comm. Notes, 39 F.R.D. 69, 107 (1966). 3/

The basis for these differing notice provisions lies in the differing nature of Rule 23(b)(3) and Rule 23(b)(2) class actions. In the typical Rule 23(b)(3) class action, the plaintiff and the class members are loosely associated by common

3/ For a detailed history of the adoption of the 1966 Rules, see Kaplan, "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)," 81 HARV. L. REV. 356, 356-58 (1967).

questions of law and fact which "predominate over any questions affecting only individual members." Fed. R. Civ. P., Rule 23(b)(3) (emphasis added). In many instances, each member will be affected by unique factual issues or special defenses which can defeat that particular claim. The classic cases are the consumer class actions, (see Vasquez v. Superior Court, 4 Cal.3d 800 (1971), or securities fraud (see Eisen v. Carlisle & Jacquelin, supra). Moreover, a particular class member may generally not desire the relief which the plaintiff seeks. In a consumer class action for rescission of contract, for example, many class members may desire their contracts to remain in force notwithstanding defendant's conduct. Thus, there is logic to the requirement of individual notice which affords the class member the opportunity to opt out of the action or to intervene.

By contrast, a Rule 23(b)(2) class is generally much more cohesive. In such a case,

"the party opposing the class is acted or refused to act on grounds generally applicable to the class as a whole. . . ." Fed. R. Civ. Proc., Rule 23(b)(2). The rights asserted by the class representative would, if established, clearly benefit the entire class. It would be surprising, indeed, to find a member of the class at bar who would say, "I prefer to forego the several thousand dollars which has been denied me since I was unconstitutionally denied my survivor's benefits." Professor Moore has referred to the welfare class action as a paradigm. In these cases, "Injunctions are sought and relief could in no way harm the class members, [therefore] the notice question appears to be of very little importance." 3B Moore, FED. PRAC. §23.05, p. 33, n. 30, and cases cited therein.

For these reasons, the members of a Rule 23(b)(2) class action are not given the chance to opt out. Housing Authority of the City of Omaha

v. United States Housing Authority, 54 F.R.D. 402, 404 (D. Neb. 1972); Gonzales v. Cassidy, 474 F.2d 67, 74, n. 12 (5th Cir. 1973), and cases cited therein. Because they do not have the choice of opting out, notice to a Rule 23(b)(2) class only serves to allow those class members who may wish to do so the opportunity to intervene. However, intervention will only be granted if the intervenor demonstrates inadequate representation on the part of the named parties. Rule 24(a), Fed. R. Civ. Proc. A court is, of course, free to direct notice to the members of a Rule 23(b)(2) class at any time it believes it necessary "for the protection of the members of the class or otherwise for the fair conduct of the action." Fed. R. Civ. Proc., Rule 23(d)(2).

The precise operation of the discretionary notice applicable in a Rule 23(b)(2) case can be seen in two decisions of Judge Flannery of the District Court for the District of Columbia, Arey v.

Providence Hospital, 55 F.R.D. 62, 70-72 (D.D.C. 1972) and Woodward v. Rogers, 344 F.Supp. 974 (D.D.C. 1972). In Arey, the named plaintiff alleged a widespread pattern of discriminatory employment practices, based on both race and sex, in violation of Title VII of the Civil Rights Act of 1964, 42 USC § 2000e et. seq. The Court required notice to the members of the Rule 23(b)(2) class because it believed that "feedback from the known class members would be instructive and aid the court by providing information as to the scope of the class the the scope and diversity of discrimination claims, thereby allowing the court to rule more intelligently in future determinations regarding the boundaries of the class, the need for sub-classes, or even a re-evaluation of the class status designation itself." 55 F.R.D. at 71 (emphasis added).

In Woodward, Judge Flannery cited his decision in Arey as an example of the court exer-

cising its discretion under Rule 23(d)(2) to require notice and then went on to say:

> "In the particular circumstances of this case, however, where the adequacy of the representation of the class interests by the named parties is clear, where no apparent purpose would be served by notice to this wide-ranging class even if notice were at all practicable, and where, indeed, judgment is in favor of the class, the essential requisites of due process have been met without further notice." 344 F.Supp. at 980, n. 10.

In focusing upon the adequacy of representation, rather than notice, the Woodward opinion is consistent with the views expressed by this Court in Hansberry v. Lee, 311 U.S. 32 (1940) as well as the majority of courts4/ and all the commen-

4/ The leading case is Northern Natural Gas Co. v. Grounds, 292 F.Supp. 619, 636 (D. C. Kan. 1968), rev'd in part on other grounds, 441 F.2d 704 (10th Cir. 1971), cert. den., 404 U.S. 951 (1971). See also, 7A Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, §1786, p. 142, n. 99, p. 143, n. 2; Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969); Hammond V. Powell, 462 F.2d 1053, 1055 (4th Cir. 1972); Bing v. Roadway Express, Inc., 485 F.2d 441 (5th Cir. 1973); Yaffe v. Powers, 454 F.2d 1362, 1366 (lst Cir. 1972); Vaughns v. Board of Ed. of Prince George's County, 355 F. Supp. 1034, 1035 (D. Md. 1972); Woodward v.

ators[5/] who have spoken to the issue.

In Hansberry v. Lee, supra, the plaintiffs sought to enforce a racially restrictive covenant against the defendants, a black family who had

Rogers, 344 F.Supp. 974, 980, n. 10 (D.D.C. 1972); Richardson v. Fargo, 61 F.R.D. 641, 644 (E.D. Pa. 1974); Johnson v. Baton Rouge, 50 F. R.D. 295, 301 (E.D. La. 1970); Rosado v. Wyman, 322 F.Supp. 1173, 1192-94, aff'd, 437 F.2d 619, 624 (2d Cir. 1970), aff'd, 402 U.S. 991 (1971); Solman v. Shapiro, 300 F.Supp. 409, 411, n. 1 (D. Conn. 1969), aff'd, 396 U.S. 5 (1970); Citizen's Environmental Council v. Volpe, 364 F. Supp. 286, 288 (D. Kan. 1973), aff'd, 484 F.2d 870 (10th Cir. 1973); Lynch v. Household Finance Co., 360 F.Supp. 720, 722, n. 3 (D. Conn. 1973); Baxter v. Savannah Sugar Refining Co, 350 F. Supp. 139, 141 (S. D. Ga. 1972); Williams v. Local 19, 59 F.R.D. 49, 55-56 (E.D. Pa. 1973); Mungin v. Florida E. Coast R.R. Co., 318 F. Supp. 720, 732 (M.D. Fla. 1970); Moss v. Lane Co., 50 F.R.D. 122, 126 (W.D. Va. 1970); Shane v. Northwest Industries, Inc., 49 F.R.D. 46, 47 (N.D. Ill. 1970).

5/ Most notable are 3B Moore, FED. PRAC. § 23.05, p. 23-275, n. 30 (1973 Supp.), § 23.55, pp. 1151-53, and 1973 Supp. thereto; 7A Wright & Miller, supra, § 1786, pp. 142-44 and Supp. thereto; Miller, "Problems of Giving Notice in Class Actions", 58 F.R.D. 299, 313-17; Wright, "Class Actions", 47 F.R.D. 169, 177-82; Frankel, "Some Preliminary Observations Concerning Civil Rule 23," 43 F.R.D. 39, 45-46; Homburger,

purchased property within a restricted zone. Plaintiffs' case turned on whether the covenant was then in effect. This question turned on whether the covenant had been signed by a sufficient number of property owners. The lower courts

"State Class Actions and the Federal Rule", 71 COLUM. L. REV. 608, 643-47 (1971); Note, "Eisen III: Fluid Recovery, Constructive Notice and Payment of Notice Costs by Defendant in a Class Action Rejected, 73 COLUM. L. REV. 1641, 1650-52; Kaplan, "A Prefatory Note", 10 B.C. IND. & COMM. L. REV. 497, 499 (1970); Maraist & Sharp, "Federal Procedure's Troubled Marriage: Due Process and the Class Action", 49 TEXAS L. REV. 1 (1970); Pomerantz, "The 'Notice To The Class' Under the Amended Rule 23", 1968 PRACTICING LAW INST. 33 (1968); Comment, "Constitutional & Statutory Requirements of Notice Under Rule 23(c)(2)", 10 B.C. IND. & COMM. L. REV. 571, 573 (1969); Note, "Class Actions Under Federal Rule 23(b)(3) -- The Notice Requirement", 29 MD. L. REV. 139, 153-54 (1969); Comment, "Adequate Representation, Notice and the New Class Action Rule: Effectuating Remedies Provided by the Securities Laws", 116 U. PA. L. REV. 889, 914 (1968); Note, "Managing the Large Class Action: Eisen v. Carlisle & Jacqueline", 87 HARV. L. REV. 426, 433-41 (1973); Note, "Proposed Rule 23: Class Actions Reclassified", 51 VA. L. REV. 629, 654 (1965); McCall, "Due Process and Consumer Protection (Etc.)", 25 HASTINGS L.J. 1351, 1389, ff. (1974).

had held that, since a previous "class action" had found that the requisite number of signatures had been obtained, res judicata precluded the defendant from relitigating that issue of fact. This Court reversed the res judicata finding, not on the ground that the defendant had not received notice of the earlier action, but because their interests had not been adequately represented by the parties thereto. Id., 311 U.S. at 42-43. This Court stated:

> "[W]hen the only circumstance defining the class is that the determination of the rights of its members turns upon a single issue of fact or law, a state could. . . constitutionally adopt a procedure whereby some of the members of the class could stand in judgment for all, provided that the procedure was so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue." Id., 311 U.S. at 43.

This Court appears to have taken the position that adequate representation, absent any notice at all, satisfied Due Process, that the very best notice, absent adequate representation, is a

Constitutional nullity. The Hansberry opinion recited the general rule that a person is not bound by a judgment in an action to which he has not been made a party by service of process, 311 U.S. at 40, citing cases, but went on to add that the class action is a recognized exception to that rule:

> "In such cases where the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree." 311 U.S. at 41-42.

A recent example of the Hansberry analytical framework is to be found in Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973). There, the issue was whether plaintiff and the class he sought to represent were bound by the res judicata effect of the previous decision involving the class (represented by a different plaintiff), the same defendants, and the same issues. The previous suit had been certified as a Rule 23(b)(2) class

action. The Court held that the "Gonzales class" was not bound by the previous judgment since the class representative had failed to appeal the adverse judgment in that case, thus the representation had been inadequate. Id., 474 F.2d at 75.

The defendant argued in Gonzales that the "Gonzales class" was bound because Gonzales at least was given notice of the adverse decision in the prior case and had time to intervene for purposes of appeal but failed to do so. In holding that the receipt of notice by a class member did not cure the Constitutional defect of inadequate representation, the Court said:

> "[A]s the 1966 amendments to Rule 23 clearly illustrate, the purpose of a class action is to allow as few as one member of a class to prosecute an action for the benefit of the class if the requirements of 23(a) and (b) are met. This is one reason why the requirement of 23(a)(4) is stringently applied. The purpose of Rule 23 would be subverted by requiring a class member who learns of a pending suit involving a class of which he is a part to monitor that litigation to make certain that his interests are being protected; this is not his respons-

ibility it is the responsibility of the class representative to protect the interests of all class members." Id., 474 F.2d at 76.

Adequacy of representation has come to mean more than just the absence of conflict between the named class representative and the unnamed members of the class. It includes "the forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the class, so as to insure them due process." Mersay v. First Republic Corp. of America, 43 F.R.D. 465, 470 (S.D.N.Y. 1968); 7A Wright & Miller FED. PRAC. & PROC., § 1786. Several courts have specifically found that in income maintenance cases, such as the case before the Court, representation by experienced legal aid attorneys assures adequate representation of the class interests. Serritella v. Engelman, 339 F.Supp. 738, 748 (D.N.J. 1972), aff'd, 462 F.2d 601 (3d Cir. 1972); Almanares v. Wyman, 334 F.Supp. 512, 518-19 (S.D.N.Y. 1971).

The basic proposition of Eisen II and its progeny is that since a class judgment is binding on the entire class, absent members are denied Due Process if they do not receive notice of the pendency of the action. Curiously, this jus tertii argument is always ardently advanced by defendants on behalf of potential members of the plaintiff class. Looked at more realistically, defendants who pursue this line of reasoning seek to avoid broader liability for their wrongs under the guise of heated advocacy of the Constitutional rights of those who are in fact their victims. This bizarre posture is made possible by application of the Eisen II reasoning that the interests of the missing class members will be fundamentally prejudiced unless notice is given.

Three of the cases in the Eisen II line go even further and look not to the interests of the missing plaintiffs but rather to the interests of the defendant. See Schrader v. Selective Service

System, Local Board 76, 470 F.2d 73, 75 (7th Cir. 1972); Zeilstra v. Tarr, 466 F.2d 111, 113 (6th Cir. 1972); Pasquier v. Tarr, 318 F.Supp. 1350, 1354 (E.D. La. 1970), aff'd, 444 F.2d 116 (5th Cir. 1971). (The Sixth and Seventh Circuit opinions rely upon the Pasquier District Court opinion.) These are a queer family. Each is an offspring of Gregory v. Hershey, 311 F.Supp.1 (E. D. Mich. 1969), rev'd, 436 F.2d 513 (6th Cir. 1971), cert. den., 403 U.S. 922 (1971). The District Court in Gregory issued an injunction on behalf of a nationwide Rule 23(b)(2) class ordering the defendant Director of the Selective Service System to grant a certain deferment to all members of the class and enjoining their induction into the Army. Although the judgment was not stayed on appeal, nor was the certification of the class raised as an issue on appeal (see Schrader, supra, 470 F.2d at 7778, Eschbach, D. J., dissenting), the defendant refused to obey the order as to the

class. Pasquier and its progeny refused to give res judicata effect to the Gregory judgment in enforcement actions brought by purported members of the class, stating as their reason that the class certification was ineffective because no individual notice had been given to the members of the class. 6/

The holding of the Pasquier District Court opinion is that individual notice is necessary to assure "fundamental fairness," Id., 318 F.Supp. at 1354, to defendants because absence such notice, a decision favorable to a defendant may not have res judicata effect. Without such effect, the absent class members could relitigate the issue on the merits, thus leaving such a defendant "in a most precarious position, [and] we simply cannot subscribe to a rule of law with such unfair conse-

6/ For more about the "Gregory" family, see Note, "Collateral Attack on the Binding Effect of Class Action Judgments," 87 HARV. L. REV. 589, 596, n. 52 (1974).

For a court which refused to join the family, see Germonprez v. Director of Selective Service, 318 F.Supp. 829 (D.D.C. 1970).

quences." Ibid. To test the soundness of the Court's reasoning, one need only consider what would happen if notice is required to be given by the named plaintiffs to a nationwide class, but the plaintiffs, due to their indigency or other causes, simply cannot give the notice. According to the Pasquier reasoning, the case must of necessity proceed only as to the named plaintiffs. If judgment is rendered in favor of the defendant, is he or she removed from that "most precarious position" of still being subject to suit by other members of the class? No. Indeed, this is the ordinary case; the class action is the exception.

Pasquier and its progeny may be explained by the firm belief that Gregory was wrongly decided on the merits (which, it turned out, it was) and the strong emotions connected with the Selective Service System and the Vietnamese War. Both of these factors were suggested in Judge Eschbach's strong dissent in Schrader, 470 F.2d at 77-78.

Subsequent decisions in Rule 23(b)(2) class actions in the Fifth Circuit have not followed Pasquier, but have affirmed that notice in such cases is discretionary, not mandatory. See Bing v. Roadway Express, Inc., 485 F.2d 441, 448 (5th Cir. 1973); Baxter v. Savannah Sugar Refining Corp., 350 F. Supp. 139, 141 (S. D. Ga. 1972); Owens v. Roberts, 377 F. Supp. 45, 55-56 (N. D. Fla. 1974).

It would also appear the Eisen II dictum is no longer given credence even in the Second Circuit itself. In two post-Eisen II welfare cases, the Second Circuit has affirmed class certification without any reference to notice. Rosado v. Wyman, 437 F.2d 619 (2d Cir. 1970), aff'd, 402 U.S. 991 (1971); and Almenares v. Wyman, 453 F.2d 1075 (2d Cir. 1971), cert. den., 405 U.S. 944 (1972).

In Almenares, the District Court certified a class of 1,500,000 New York welfare recipients.

Almenares v. Wyman, 334 F.Supp. 512, 518-19 (S.D.N.Y. 1971). The Court took "note of the fact that the attorneys representing plaintiffs. . . are public service legal organizations experienced in litigation of this nature. It may be presumed that they will represent plaintiffs in a fashion that will fairly and adequately represent the interests of the class. Having thus found adequacy of representation, the Court certified the class without requiring notice. Judge Friendly, in his opinion affirming the District Court, specifically treated the class action issues at length and specifically recognized the distinction between Rule 23(b)(2) and (b)(3) cases. Almenares v. Wyman, supra, 453 F.2d at 1084-86, esp. 1086, n. 15a. No notice was required.

In Rosado, the District Court certified a class of 1,500,000 New York welfare recipients giving extended consideration to class action questions. Rosado v. Wyman, 332 F.Supp. 1173, 1191-

94 (E.D.N.Y. 1970). Judge Weinstein's primary emphasis was on adequacy of representation; he said:

> "This case has been widely noted in the press. See, e.g., National Institute for Education and Law and Poverty, 3 Clearinghouse Review 54 (1969); id. at 82; id. at 321. There are many legal offices upstate devoted to protecting welfare clients and other poor. Any of them could have, if they were so advised, intervened in this action at any time. That they have not done so suggests that they believe that the plaintiffs' attorneys were properly carrying forward the suit. Silence with knowledge has considerable significance in a case of possible conflict. C.f., Snyder v. Board of Trustees of the University of Illinois, 286 F. Supp. 927, 931, 937 (N.D. Ill. 1968)." 322 F.Supp. at 1193.

The Second Circuit affirmed. 437 F.2d 619, 624 (1970). No notice was required. It is significant that two of the three judges on the Second Circuit's Rosado panel, Judge Hayes and Chief Judge Lombard, were on the Eisen II panel.

Most persuasively, the recent case of

Lynch v. Household Finance Corp., 360 F. Supp. 720 (D. Conn. 1973) demonstrates the lack of vitality of Eisen II even in the Second Circuit. Second Circuit Judge Anderson's opinion for the pre-judge court in Lynch, concurred in by Second Circuit Judge Timbers and District Judge Zampano, spells the death-knell for Eisen II and its progeny:

> "This is a proper class action under F. R. CIV. P. 23(b)(2), because an injunction and a declaratory judgment were the only relief sought. Notice to members of the classes was neither given nor required in this case. Hansberry v. Lee, 311 U.S. 32, 41-43, 61 S. Ct. 115, 85 L. Ed. 22 (1940); see, also, Yaffe v. Powers, 454 F.2d 1362, 1366 (1st Cir. 1972); Wilczynski v. Harder, 323 F.Supp. 509, 512, n. 3 (D. Conn. 1971); Solman v. Shapiro, 300 F.Supp. 409, 411, n. 1 (D. Conn. 1969), aff'd, 396 U.S. 5, 90 S. Ct. 25, 24 L. Ed.2d 5 (1969); Comment of the Advisory Committee, 39 F.R. D. 69, 106-07 (1966); 3B J. Moore, Federal Practice ¶ 23.55, at 23-1152-53, ¶ 23.72, at 23.1421-11 (2d ed. 1969). The interests of the absent parties were fairly insured because there are no money damages, there is no factual issue to be resolved, counsel for the named parties adequately

represent the classes, the Commercial Law League is a participant as an amicus curiae for the defendants, and the legal constitutional issue is not complex in light of the recent Supreme Court decisions. Although it is suggested that dictum in Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564-565 (2d Cir. 1969) [Eisen II], requires notice in all class actions, see Moore, supra, we read Eisen simply to say that notice is required in all class actions when due process so requires. Furthermore, notice of the proceedings was given to the Governor and the Attorney General of Connecticut pursuant to 28 U.S. Code § 2284." Id., at 722, n. 3.

CONCLUSION

We believe that the foregoing analysis demonstrates that the Government's claim that Due Process requires notice in a Rule 23(b)(2) class action, Jurisdictional Statement at 13, n. 9, is in error and therefore we urge affirmance.

DATED: San Francisco, California

February 19, 1975.

Respectfully submitted,

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By _____
RALPH SANTIAGO ABASCAL

Office of the Solicitor General
Washington, D.C. 20530

February 13, 1975

Ralph Santiago Abascal, Esq.
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San Francisco Neighborhood
Legal Assistance Foundation
1095 Market Street--Suite 302
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Re: Weinberger v. Salfi (No. 74-214)

Dear Mr. Abascal:

As requested in your letter of February 10, 1975, I consent to the filing of a brief amicus curiae in the above case by the San Francisco Neighborhood Legal Assistance, Inc., Western Center on Law and Poverty, Inc., National Organization for Women, Inc., Mexican-American Legal Defense and Education Fund, Inc., Food Advocates, the American Civil Liberties Union of Northern California, Inc. and the Charles R. Drew Health Rights Project of the Charles R. Drew Post-Graduate Medical School, Los Angeles, California.

Sincerely,

Robert H. Bork

Robert H. Bork
Solicitor General

LEGAL AID SOCIETY OF SAN MATEO COUNTY
2221 BROADWAY
REDWOOD CITY, CALIFORNIA 94063
TELEPHONE (415) 365-8411

PETER H. REID
EXECUTIVE DIRECTOR

December 31, 1974

Ralph Abascal, Esq.
San Francisco Neighborhood
Legal Assistance Foundation
1095 Market St. #302
San Francisco, CA 94103

Re: Salfi v. Weinberger
U.S. Sup. Ct. O.T. 1974
No. 73-214

Dear Ralph:

I am writing to confirm our consent to the filing of an amicus brief by you and other interested parties in the above-entitled matter. Thank you for your assistance and cooperation. We shall forward a copy of the government's brief to you as soon as received.

Very truly yours,

BRUCE N. BERWALD
Attorney at Law

BNB:bc